

IN THE HIGH COURT OF JUDICATURE AT PATNA
SECOND APPEAL No.99 of 1991

(Appeal against the judgment and decree dated 23.11.1990 passed by learned District Judge, Saran at Chapra in Title Appeal No.85 of 1989 affirming the judgment and decree dated 31.07.1989 passed by learned 2nd Additional Munsif, Chapra in T.S.No.122 of 1985/93 of 1988)

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Late Chitrakut Tiwary through L.Rs.

... .. Appellant/s

Versus

Ram Chandra Rai

... .. Respondent/s

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Appearance :

For the Appellant/s	:	Mr.Bhupendra Narain Sinha, Adv
	:	Mr. Shailendra Kumar, Adv
	:	Mr.Saket Kumar, Adv
For the Respondent/s	:	Mr.Kumar Uday Singh, Adv

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CORAM: HONOURABLE MR. JUSTICE BIRENDRA KUMAR
CAV JUDGMENT

Date :13-03-2019

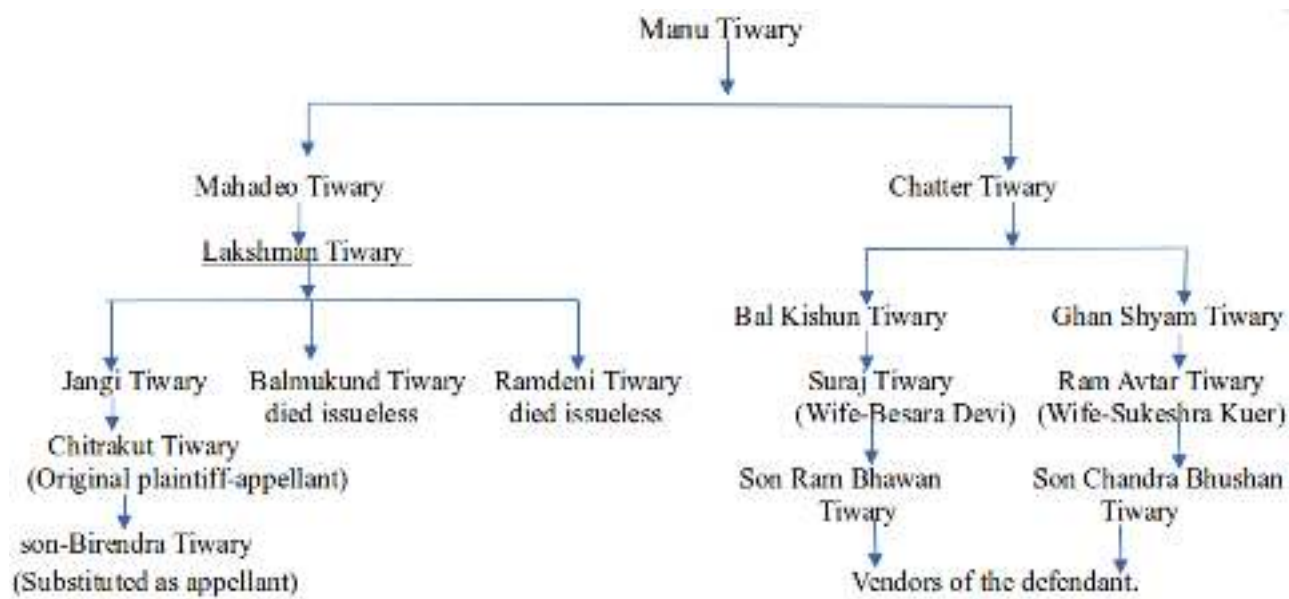
Heard learned counsel for the parties.

2. This is plaintiff's appeal. Original plaintiff-Chitrakut Tiwary had brought T.S.No.122 of 1985/93 of 1988 against the sole respondent-Ram Chandra Rai for relief of permanent injunction against the respondent to restrain from interfering with the possession of the plaintiff-appellant over the suit land. The plaintiff has lost before both the learned courts below.

3. Before referring to the case and claim of the parties, it would be apt to have a glance at the genealogy of the family of the plaintiff and the vendors of the defendant.



Genealogical Table



4.The case and claim of the plaintiff in brief is that ancestor Manu Tiwary had two sons Mahadeo Tiwary and Chatter Tiwary. After death of Manu Tiwary, Mahadeo Tiwary and Chatter Tiwary divided the joint family property by metes and bounds, prior to the cadestral survey save and except the orchards, which remained joint. The plaintiff belongs to the branch of Mahadeo Tiwary and the vendors of the defendant-respondent belongs to the branch of Chatter Tiwary. According to the plaintiff, the plaintiff was in possession of the suit property which was allotted in partition to the ancestor of the plaintiff. The vendors of the defendants, namely, Chandra Bhushan Tiwary and Ram Bhawan Tiwary had no transferable right in respect of the suit land and they executed two registered sale deeds dated 22.08.1985 in favour



of the defendant and on that basis, defendant was attempting to dispossess the plaintiff-appellant.

5. The defendant resisted the claim of the plaintiff by filing written statement mainly on the ground that the family of Mahadeo Tiwary and Chatter Tiwary never partitioned their property by metes and bounds rather there was unity of title and possession amongst their descendants. However, for convenience, the parties were cultivating the joint family property separately and at the time of purchase, the vendors of the defendant-respondent were in possession and after transfer, the defendant was put in possession of the suit land.

6. The learned trial court considered two important issues; whether there was partition by metes and bounds between Mahadeo Tiwary and Chatter Tiwary and second issue whether the plaintiff had perfected his title by adverse possession on the suit land. The learned trial court disbelieved to the plaintiff's witnesses on partition and separate possession of the plaintiff on the suit land for the reason mentioned in the trial court judgment and relied on the witnesses of the defendant-respondents. The learned trial court though referred to the documentary evidences produced on the record, however, did not consider the same without any reason thereto. The learned trial court further rejected the claim of the plaintiff of acquisition of title by adverse possession on the ground



that since the suit property was joint family property, there was no question of adverse possession of one of the cosharers. Accordingly, the learned trial court held that the plaintiff-appellant is not entitled for permanent injunction and the suit was dismissed.

7. The learned lower appellate court concurred with the view of the learned trial court that witnesses of the plaintiff were not reliable and acceptable and witnesses of the defendant were reliable and acceptable. The learned lower appellate court discussed the documentary evidences brought on the record, however, has not properly and correctly considered the same rather has misread the same which would be discussed later on. Only point for consideration before the learned lower appellate court was whether there was partition of the joint family ancestral property between the two sons of Manu Tiwary by metes and bounds and the suit property fell into the share of the plaintiff's branch. The learned lower appellate court held that there was absolutely no direct evidence, oral or documentary, of partition by metes and bounds between the two sons of Manu Tiwary, namely, Mahadeo Tiwary and Chatter Tiwary. The learned lower appellate court held that the plaintiff was wholly incompetent to say anything on the old partition and allotment of share. The plaintiff's case was disbelieved for one more reason that if there was partition by metes and bounds between Mahadeo Tiwary and



Chatter Tiwary before cadestral survey, the Plaintiff should have disclosed list of the properties allotted to Mahadeo Tiwary and list of the properties allotted to Chatter Tiwary in the plaint itself which the plaintiff has not done. However, the learned lower appellate court on the basis of documents brought on the record was of the view that the descendants of Chatter Tiwary and Mahadeo Tiwary were dealing with the property rather alienating the same but that is not the evidence of partition by metes and bounds. The learned lower appellate court specifically held that valid title passed to the defendant by virtue of the registered sale deeds vide Exts.A and A/1 executed by Chandra Bhushan Tiwary and Ram Bhawan Tiwary. The court further found that the defendant was in possession of the suit land.

8. This appeal was admitted for hearing on 12.08.1991 on following substantial question of law.

(i) Whether the courts below have erred in law in rejecting the plaintiffs case of partition by metes and bounds, because

(a) the lower appellate court shut its eyes upon the fact that there has been inter se transfer of property between the two branches?

(b) The Lower Appellate Court not appreciated and gave effect to the irrefutable fact that the defendants



purported vendor's branch admitted (Exts.3 and 12) partition by metes and bounds inter se amongst themselves and not that factual basis defeated the claim of a purported purchaser from the branch of the other vendor of the defendant?

(c) The lower appellate court not appreciated and gave affect to the irrefutable fact that various members of the branches of the defendant's vendors as also members of the plaintiff's branch have been transferring lands(1) only from the land shown in the khatiyani to be in their separate possession (2)claiming to be exclusive owner in possession and not mere cosharers, (3) showing members of the plaintiff's branch to be owners of land on the boundary of the vended lands, thus showing different ownership between themselves and the plaintiff's branch?

(d) The lower appellate court not appreciated and gave affect to the irrefutable fact that the khatiyani have been showing the two branches to have been in separate possession of the different land over such a long time from the beginning of the century?



(e) The lower appellate court drew seriously adverse inference against the plaintiff for not having impleaded the vendors of the defendant even though they were not necessary to be made party to this suit, and the lower appellate court did not appreciate and give affect to the fact that the vendors were summoned (Ext.5) in this suit and they chose not to appear?

(f) the lower appellate court rejected Ext.10/e out of consideration wrongly by not noticing the fact that Chhater Tiwary's branch were in possession of the land which showed that the mention of sur-name and caste in Ext.10/e was evidently a mistake?

(g) The lower appellate court committed following amongst other vital errors of record:

(1) that not the entire lands of plot nos.8,9,29 and 30 of khata no.14, but parcel of the land were recorded in the name of Lakshman Tiwary, whereas Ext.10/a, the khatian shows that the entire area of those plots were recorded in possession of Lakshman Tiwary.

(2) that it was not very much clear that the land recorded in possession of Lakshman Tiwary was alienated to the defendant when the khatian clearly



shows that plot nos.8,9,15,19,29 and 30 of khata no.14, plot no.71 of khata no.1 and plot no.31 of khata no.36 were in exclusive possession of Lakshman Tiwary and

(3) that the plaintiff has not described in the plaint which land had fallen to the shares of Mahadeo Tiwary and to the share of Chhatar Tiwary on partition, whereas in fact the description of the lands of the family (including that in Jonpur district of U.P.) allotted to two branches stated in the plaint by reference to public documents i.e. the khatiyan in a sufficiently complete description for the pleadings?

9. The record reveals that the aforesaid substantial question of law is reproduction of the grounds of this appeal disclosed in para-1 of the memo of appeal. A reading of the same would reveal that only substantial question of law is whether the courts below have erred in law in rejecting the plaintiff's case of partition by metes and bounds. The rests are reason for the assertion of error committed by the learned lower appellate court.

10. Before considering the aforesaid substantial question of law, I would like to go through a very pertinent issue arising in this appeal regarding the consequence and affect of



law, if the findings of the courts below is accepted in toto and stand of the defendant is accepted as it is. The second appellate court is competent to decide such issues in view of the provisions of Section 103 C.P.C.

11. It is well known that civil disputes are decided on the basis of probability of the case of the parties especially when the case has been contested. It is admitted case of the parties that suit property is ancestral property of the plaintiff and the vendors of the defendant. The plaintiff and vendors of the defendant are governed by Mitakshra School of Hindu Law. The learned courts below have consistently held that the plaintiff failed to prove a case of partition of the joint family property by metes and bounds between Mahadeo Tiwary and Chatter Tiwary. Thus the entire joint family property including the suit property remained joint with unity of title and possession on each and every inch of the property. It is specific case of the defendant that there was never any partition of joint family property between Chatter Tiwary and Mahadeo Tiwary. However, the parties were in cultivating possession of the land according to their convenience and at the time of sale in favour of the defendant, vendors were in possession of the suit property. Recitals of the sale deeds in favour of the defendant available at Exts. A and A/1 would reveal that the transferred land is



recorded in survey khatiyani in the name of referred ancestors describing their shares and all are in joint possession of the same. Thus on the aforesaid facts situation emerges that the suit property is joint family property governed by the Mitakshra School of Hindu Law. According to Section 313 of the Mulla's Hindu Law 21st edition a purchaser of the undivided interest of a coparcener at a sale in execution of a decree can demand partition according to all schools. a purchaser of the interest of the coparcener by private contract can claim partition in Bombay, Madras and Madhya Pradesh, but not in Bengal or Uttar Pradesh. the reason is that, according to mitakshara law, as interpreted in Bengal and Uttar Pradesh, a coparcener cannot sell his interest in the coparcenary (Section 260 and 261). Section 259 provides that if an outsider purchases the coparcenary property he acquires merely the right to claim a partition, which the coparcener whose interest he had purchased might have compelled had he been so minded, before the sale of his interest took place. That right can only be enforced by a suit for a general partition to which all the coparceners must be joined as parties. The purchaser may, in such a suit, ask the court to allot to his vendor the specific property sold to him, and the court may allot that property to him if the interest of the other coparceners will not be prejudiced thereby. Apparently, the



plaintiff of this case is undisputably in joint possession of the suit land and the defendant as purchaser of the coparcenary property has no right to take possession rather he has no right even to enforce partition. In absence of legal remedy, the defendant cannot attempt to take possession or pose threat to the person in lawful possession(the plaintiff) to dispossess him and if such a situation arises a decree for permanent injunction in favour of the plaintiff is fit to be granted.

12. In **Anathula Sudhakar Vs. P. Buchi Reddy** reported in **AIR 2008 SC 2033**, the Hon'ble Supreme Court summarized the position in regard to the suit for prohibitory injunction relating to immovable property in para-17 of the judgment which is being reproduced below.

“17. To summarize, the position in regard to suits for prohibitory injunction relating to immovable property, is as under :

(a) Where a cloud is raised over plaintiff's title and he does not have possession, a suit for declaration and possession, with or without a consequential injunction, is the remedy. Where the plaintiff's title is not in dispute or under a cloud, but he is out of possession, he has to sue



for possession with a consequential injunction.

Where there is merely an interference with plaintiff's lawful possession or threat of dispossession, it is sufficient to sue for an injunction simpliciter.

(b) As a suit for injunction simpliciter is concerned only with possession, normally the issue of title will not be directly and substantially in issue. The prayer for injunction will be decided with reference to the finding on possession. But in cases where de jure possession has to be established on the basis of title to the property, as in the case of vacant sites, the issue of title may directly and substantially arise for consideration, as without a finding thereon, it will not be possible to decide the issue of possession.

(c) But a finding on title cannot be recorded in a suit for injunction, unless there are necessary pleadings and appropriate issue regarding title [either specific, or implied as noticed in Annaimuthu Thevar (supra)]. Where the



averments regarding title are absent in a plaint and where there is no issue relating to title, the court will not investigate or examine or render a finding on a question of title, in a suit for injunction. Even where there are necessary pleadings and issue, if the matter involves complicated questions of fact and law relating to title, the court will relegate the parties to the remedy by way of comprehensive suit for declaration of title, instead of deciding the issue in a suit for mere injunction.

(d) Where there are necessary pleadings regarding title, and appropriate issue relating to title on which parties lead evidence, if the matter involved is simple and straight-forward, the court may decide upon the issue regarding title, even in a suit for injunction. But such cases, are the exception to the normal rule that question of title will not be decided in suits for injunction. But persons having clear title and possession suing for injunction, should not be driven to the costlier and more cumbersome



remedy of a suit for declaration, merely because some meddler vexatiously or wrongfully makes a claim or tries to encroach upon his property. The court should use its discretion carefully to identify cases where it will enquire into title and cases where it will refer to plaintiff to a more comprehensive declaratory suit, depending upon the facts of the case.”

13. In this case, if the case of the defendant is accepted as it is, the plaintiff is in constructive and lawful possession of his joint family property and the defendant has no right to dispossess, except according to law. Thus in my view, the suit is fit to be decreed on this ground alone. Both the courts below have erred in appreciating the consequences of law on the admitted facts of this case. Hence, the impugned judgments and decrees are fit to be set aside for this reason alone.

14. The substantial question of law.

Learned counsel for the appellant submits that there is ample documentary evidence to substantiate that the branch of Mahadeo Tiwary and Chatter Tiwary separated before cadestral survey. Consequently, when the survey record of right was



prepared and published the name of descendants of the two branches is entered showing their respective share in column No.2 of the record of right and showing individual possession on the individual plot in the remarks column. Learned counsel has referred Ext.B brought by the respondent and Ext.10A to 10D brought by the plaintiff-appellant. All the aforesaid documents are certified copy of the record of right. Learned counsel next submits that the descendants of both branches i.e. Mahadeo Tiwary and Chatter Tiwary were dealing with the property allotted to their respective share separately in transaction of sale etc. with the outsiders as well as inter se. According to learned counsel, mutual transactions between two members is strong evidence of separation. Reliance has been placed on case of **Ram Bahadur Nath Tiwary Vs. Kedar Nath Tiwary & Ors** decided by a Division Bench of this Court reported in **AIR 1977 Patna 59**.

15. Next contention is that one Gopal Tiwary and others had purchased Plot No.32 and 33 of Khata No.36 from Suraj Tiwary, the father of one of the vendors of the defendant (reference may be made to the genealogical table) through registered sale deeds dated 25.11.1960 and 22.12.1960. Said Gopal Tiwary brought T.S.No.146 of 1962 for recovery of



possession or for partition of his purchased property. The descendants of Chatter Tiwary were descendants of the suit. Sukeshra Kuer wife of Ram Avtar Tiwary (reference may be made to genealogical table) filed her written statement vide Ext.3, stating therein that the branch of Chatter Tiwary i.e. Balkishun Tiwary and Ghanshyam Tiwary have already separated. According to learned counsel, admission of Sukeshra Kuer that joint family property was divided among the descendants of Chatter Tiwary is strong evidence of partition between Mahadeo Tiwary and Chatter Tiwary. According to learned counsel, the vendors of the defendant were not necessary party to the suit in view of admission of the defendant in his pleading that he had purchased joint family property. However, the vendors were noticed to depose in the case vide Ext.5 but they did not choose to appear. Hence, the learned lower appellate court should not have drawn adverse inference for that reason.

16. Learned counsel for the respondent contends that finding of the learned lower appellate court is based on material on the record, hence, it cannot be said that the finding is erroneous one. The second appellate court cannot substitute its own reason unless the finding of the learned lower appellate court is said to be based on no evidence or suffers from error of



record. According to learned counsel for the respondent, admission of Sukeshra Kuer, a female, who was not a coparcener is not binding on the vendors of the defendant for the reason that the vendors had not inherited their right from Sukeshra Kuer. He further submits that the learned lower appellate court has rightly held that there is lack of material to substantiate possession of the plaintiff on the suit land rather the witnesses have supported the possession of the defendant. Hence, permanent injunction cannot be granted. This finding is also substantiated by material.

17. Now the question to be considered is whether the court below has erred rather committed error of record in not accepting the evidence, of partition and separate possession of plaintiff on suit land, available on the record. Before considering the materials, it would be necessary to look into the well settled law of joint family property and partition thereof.

18. It is trite law that general principle is that every Hindu family is presumed to be joint unless the contrary is proved, but this presumption can be rebutted by direct evidence or by course of conduct. Further partition can be partial qua person and property (reference may be made to the judgment of the Hon'ble Supreme Court in **Kalyani Vs. Narayanan & Ors**, reported in **1980 SC 1173**).



19. Section 321 of the Mulla's Hindu Law 21st edition says that according to the true notion of an undivided mitakshra family, no individual member of that family, whilst it remains undivided, can predicate of the joint property, or that a particular member, has a certain definite share, one-third or one-fourth. Partition, according to that law, consists in a numerical division of the property; in other words, it consists in defining the shares of the coparceners in the joint property; and actual division of the property by metes and bounds is not necessary. Once the shares are defined, whether by an agreement between the parties or otherwise, the partition is complete. After the shares are so defined, the parties may divide the property by metes and bounds, or they may continue to live together and enjoy the property in common also before. However, whether they do the one or the other, it affects only the mode of enjoyment, but not the tenure of the property. The property ceases to be joint and immediately the shares are defined, and henceforth, the parties hold the property as tenants-in-common and not as joint tenant.

20. In **Ram Bahadur Nath Tiwary** Case (Supra) the Division Bench observed in paragraph-14 of the judgment as follows:



“.....In the present case, it is clear from the evidence on record that the parties to the suit have been exercising separate possession not only over the properties admitted by the plaintiff to have been partitioned before the survey, but also over the properties claimed by the plaintiff to have remained unpartitioned after the survey. The separate dealings by the plaintiff as well as by the defendants in respect of their specific shares are ample proof of the above fact. The above decision, in my opinion, does not assist the appellant. In the present case, the defendants claimed that all the properties had been partitioned, some before the survey and some after the survey. The pre-survey partition was admitted by Shri Roy. As regards the post-survey partition, it has been shown above that the parties were not only exercising their respective possession over the property but were also dealing with it by executing various documents in respect of their specific shares. Thus, it must be found that the defendants had proved their case of partition of the remaining lands after the



survey. Separate transactions by members of a joint family may not by themselves establish separation, but mutual transactions between two members of a family stand on an entirely different footing and they furnish a very strong evidence of separation.”

21. Section 327 thereof says that a partition between coparceners may be partial either in respect of the property or in respect of the persons making it. After a partition is affected, if some of the properties are treated as common properties (in the present case orchards etc remained joint), it cannot be held that such properties continued to be joint properties, since there was a division of title, but such properties were not actually divided.

22. Following are the lists of the suit property and evidence in respect thereof on the record.

Suit property in village-Parbeja, P.S.Sonepur, District-Saran.

Khata No. Plot No.

14	8,9,15,19,29,30(defendant has purchased through Ext.A1)
16	71(defendant has purchased through Ext.A)
36	31 (defendant has purchased through Ext.A)



23. In Ext.A, the appellant has been shown in the southern boundary of one of the plots which goes to show that the defendant was conscious of separation in the joint family property. The defendant has produced Ext.B which is certified copy of the survey record of right. The Ext.B would reveal that in column-2, the respective share of the individual coparcener is mentioned and the remarks column i.e. the last column would show that Plot Nos.8,9,15,19,29,30,71 and 31 were in possession of Lakshman Tiwary, the grandfather of the plaintiff. Thus the suit properties were recorded in possession of the grandfather of the plaintiff. The defendant has brought this document on record to show that the branch of his vendor got lesser share which was not a fair partition.

24. Ext.B would show that Plot Nos.5,7, 17 and 72 were recorded as in possession of Ram Avtar Tiwary, of the branch of the vendor of the defendant. Similarly, Plot Nos.75,23,32 and 33 were shown in possession of Chatter Tiwary, the branch of the vendor of the defendant vide Ext.10B and 10D. In Ext.3, the written statement, Sukeshra Kuer has admitted that Plot Nos.5,7,17,20,32 and 33 of her branch was divided by metes and bounds among Balmukund Tiwary and Ghanshyam Tiwary (reference of genealogy table may be made).



Thus, in my view, this is not a case of unequal distribution of property. Even if there is case of unequal distribution, a stranger cannot challenge it because many a times the parties accept unequal distribution, considering the value of the land, the utility of the land catering his need or vicinity of the land for the purpose of cultivation or other use. None of the coparceners ever challenged the unequal distribution of land. The learned lower appellate court has ignored to consider the aforesaid evidences correctly. Hence, the finding of the learned court below that there was no partition is apparently an error of the record.

25. Ext.2 is registered sale deed dated 29.03.1979, whereby Chandra Bhushan Tiwary, the vendor of the defendant sold away Plot No.72 under Khata No.16 and Plot No.70 under Khata No.15 to one Janak Rai. The appellant is shown in the boundary of the sold land. Janak Rai exchanged the purchased plot vide Ext.4 dated 07.06.1985 with the appellant. Ext.2/A is registered sale deed dated 19.08.1968 executed by Suraj Tiwary, father of the vendor of the defendant in favour of Birendra Tiwary, the present appellant, son of original appellant-Chitrakut Tiwary. Ext.6F is registered sale deed dated 14.06.1968 executed by the original plaintiff-Chitrakut Tiwary in favour of Besara Devi, mother of Ram Bhawan Tiwary, the vendor of the



defendant. The aforesaid documents show that the parties were dealing with the family property recorded in the records of right in their ancestor's possession inter se. Besides the aforesaid Ext.2B, the registered sale deed dated 28.05.1956 by Suraj Tiwary to Dharikshan Tiwary. Ext.2C registered sale deed dated 03.11.1954 by Suraj Tiwary to Dharikshan Tiwary. Ext.2D registered sale deed dated 28.11.1956 by Suraj Tiwary to Din Dayal Tiwary, son of Dharikshan Tiwary would show that father of the vendor of the defendant was selling away the property allotted to his share to different outsiders. Likewise, Exts.6 to 6/E are registered mortgage deeds from 1942 to 1965 which would show that the father of the plaintiff and the plaintiff were frequently mortgaging the property in their share to some other person. Ext.9 is the voter list of the year 1966 to show that both the branches belonging to different family.

26. The learned lower appellate court did not consider the aforesaid evidences correctly which were proof of dealing with the family property separately by the individual members of the family and was strong proof of partition.

27. The plaintiff brought different rent receipts Ext.1 series on the record to substantiate his possession over the suit land. The learned lower appellate court simply rejected the



aforesaid rent receipts on the ground that they were not properly proved nor they contain Plot Nos. There was no better documentary evidence on the record before the learned court below. Hence, the preponderance of probability was in favour of the plaintiff, who had produced some documentary evidence to prove his possession. This Court is not going into the merit of the finding of the learned court below on the rejection of ocular evidence of the plaintiff on possession and acceptance of the ocular evidence of the defendant on possession. However, one thing is clear that the ocular evidence cannot prevail over documentary evidence on the issue of possession after production of records of right and rent receipts. The defendant had not produced any evidence to substantiate the claim of title and possession of his vendors on the purchased land. In view of the discussion above, it is evident that the defendant had purchased through Exts.A and A/1 from a non-title holder.

28. Now coming to the issue whether admission of Sureshra Kuer would be binding on the vendors of the defendant. Sureshra Kuer on the date of filing of written statement on 17.04.1963 in T.S.No.146/1962 vide Ext.3 was a widow. Her limited property right in the joint family property had already matured as absolute right after the Hindu Succession



Act, 1956. Prior to that the Hindu Women's Right to Property Act, 1937 was there. Sub Section 3 (1) thereof relates to devolution of property of the Hindu governed by *Dayabhaga* and Sub Section 2 is applicable in the matter of devolution in respect of any other school than *Dayabhaga* School and the same is applicable for this purpose;

“3. Devolution of property.-(2)When a Hindu governed by any school of Hindu law other than Dayabhaga School or by customary law dies having at the time of his death an interest in a Hindu joint family property, his widow shall, subject to the provisions of sub-section (3), have in the property the same interest as he himself had.

(3) Any interest devolving on a Hindu widow under the provisions of this section shall be the limited interest known as a Hindu woman's estate, provided however that she shall have the same right of claiming partition as a male owner.

(4) The provisions of this section shall not apply to an estate which by a customary or other rule of succession or by the terms of the grant applicable



thereto descends on a single heir or to any property to which the Indian Succession Act, 1925, applies.”

29. The provisions of sub section 3 makes it clear that even during limited interest she has a right of claiming partition as a male owner. Section 18(2) of the Evidence Act says that admission of any person from whom the parties to the suit have derived their interest in the subject matter of the suit are admissions, if they are made during the continuance of the interest of the person making the statement. The vendors of the defendant had derived interest from Sukeshra Kuer also who was their mother. Hence, statement of Sukeshra Kuer was binding on the vendors of the defendant. As such, there is admission of partition of the joint family property by the vendors of the defendant also.

30. The overall effect of the documentary evidence on the record is that the plaintiff's case is well proved that there was partition between the two branches of Mahadeo Tiwary and Chatter Tiwary before the cadestral survey. Hence, during cadestral survey when the records of right was prepared, share of individual coparcener was also defined which is itself an evidence of partition. Besides the aforesaid, the metes and bounds partition is proved by the individual possession of the



individual member of the coparcenary on the referred plot. Moreover, the parties were independently dealing with the joint family property, even amongst the inter se which are strong evidence of partition coupled with the receipt of payment of rent to the government by the plaintiff in respect of the khata mentioned in the rent receipts under which the suit plot belong. The learned lower appellate court has committed error of record in not appreciating the aforesaid evidences on the record and the learned trial court has not even discussed the aforesaid evidences. Hence, this Court is competent to correct the same as the error apparent on the face of record gives rise to a substantial question of law.

31. Learned counsel for the respondent has placed reliance on the judgment of the Hon'ble Supreme Court in **Ramji Rai and Anr Vs. Jagdish Mallah and Anr**, reported in **AIR 2007 SC 900** for his submission that permanent injunction can be granted only for protection of possession and on failure to prove possession, the same cannot be granted. In the present case, there is sufficient evidence to prove possession of the plaintiff. Hence, the aforesaid case law is not applicable.



32. Accordingly, the judgments of both the courts below are hereby set aside and the plaintiff suit is decreed, as prayed for.

33. This second appeal stands allowed. However, without any costs in the facts and circumstances of this case.

(Birendra Kumar, J)

Nitesh/-

AFR/NAFR	AFR
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